Supreme Court, U.S.
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NO. _____

In the Supreme Court of The United States of America

OCTOBER TERM 1993

Arthur L. Miccio
Petitioner

VS.

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C.

New Jersey Department of Community Affairs (DCA)
William Connolly
Charles Decker
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Did the District Court decide correctly & did the Third Circuit Court of Appeals affirm said decision correctly that the Respondents were entitled to Summary Judgement, even though discovery was not completed & genuine issues of material fact were still in dispute?

2. Did the District Court decide correctly & did the Third Circuit Court of Appeals affirm said decision correctly that the "Plaintiff failed to meet certain performance standards in his backlog," when the Petitioner never received an unsatisfactory work performance rating up to the date of when a reorganization occurred & the "backlog" was never used as a criteria to evaluate the Petitioner's work performance, since Respondents Knew a "construction boom" occurred within the Construction Industry & the Petitioner's Construction Plans Approval Section was understaffed?

3. Did the District Court decide correctly & did the Third Circuit Court of Appeals affirm said decision correctly that the Petitioner failed to objectively establish that the nondiscriminatory reasons by the Respondents were pretextual, even though other Circuit Courts have stated that plaintiff need only make a *minimal* showing of discrimination, in a non-reduction discrimination case, under the ADEA?

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NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1993

ARTHUR L. MICCIO, SR., PRO SE, PETITIONER

VS.

NEW JERSEY DEPARTMENT OF
COMMUNITY AFFAIRS (DCA)

WILLIAM CONNOLLY, CHARLES DECKER,
RESPONDENTS

PETITION OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Arthur L. Miccio, Sr., respectfully prays that a writ of certiorari issue to review the judgment order and sur petition for rehearing for the Third Circuit which affirmed the Memorandum and Order issued by the District Court of New Jersey, granting summary judgment to the Respondents, even though discovery was not completed and despite the existence of disputed issues of material fact regarding whether Petitioner had

established a prima facie case of age discrimination and whether respondent's non-discriminatory reasons are pretextual.

OPINIONS BELOW

The unpublished Memoranda and Order by the District Court for the State of New Jersey, appears as Appendix A and the Judgment Order, affirming the District Court's decision appears as Appendix B and the SUR Petition for Rehearing appears as Appendix C.

JURISDICTION

The Petitioner timely filed a discrimination complaint with the United States Federal Court on July 2, 1991 to the United States District Court for the Eastern District of Pennsylvania and was transferred to the New Jersey District Court in Trenton on November 6, 1991.

The Petitioner timely filed an appeal on July 6, 1993 to the Third District Court and issued a Judgment Order, dated November 12, 1993 which affirmed the District Court's decision and the Petitioner's Petition for Rehearing was denied dated January 4, 1994 and a timely Writ of Certiorari to the Honorable Supreme Court is now filed by the Petitioner. This Court's jurisdiction is invoked under Title 23, U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C., §621 et seq.

Fourteenth Amendment to the Constitution.

STATEMENT OF THE CASE

The Petitioner, timely filed a discrimination complaint, without any citings, Pro Se, on July 2, 1991, to the United States District Court for the Eastern District of Pennsylvania which was subsequently transferred to the District Court of New Jersey (Trenton) on November 6, 1991.

On April 4, 1992, the Petitioner was allowed (20) days to amend his original claim and add an age discrimination claim pursuant to 29 U.S.C. §621 et seq., but the District Court Magistrate denied Petitioner's motion under Rule 12, to again amend his complaint to include a Conspiracy Claim pursuant to (§1983), because of a minor defect, and the District Court Judge denied the Appeal made in the interest of justice under Fed. R. Civ. P. 15, to be allowed to make a second amendment to the claim.

On April 24, 1993, the Respondents Motion to Dismiss Petitioner's Complaint pursuant to Fed. R. Civ. P. 12(b)(6), was denied, but Respondents Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56 was granted. The lower District Court, established the elements of criteria, which were used and affirmed by the Third Circuit Court.

(1) plaintiff is a member of the protected class

(2) plaintiff is qualified for the position he sought but did not receive

(3) the promotion sought was given to a person sufficiently younger to permit an inference of age discrimination

The lower District Court stated the Petitioner satisfied both the first and third elements of criteria, but failed the second element of criteria, stating the Petitioner was not qualified based upon the "objective" qualifications, used by the Respondents. However after summary judgment was issued the Respondents admitted

the Petitioner was treated differently from the other younger employees and his upgraded, across-the-board, promotional title, *in dispute,* was changed and placed in the SES/unclassified service rather than remaining in the classified service classification.

The Petitioner timely filed an appeal, Pro Se, to the Third Circuit Court of Appeals. The Petitioner argued before the Third Circuit Court that the Summary Judgment was issued prior to discovery being completed, pursuant to the Fed. R. Civ. P. 56.

The Respondents implemented a non-reduction in work force reorganization, which expanded a single bureau to six (6) new bureaus, which upgraded the Petitioner's working section as a whole entity, to a bureau level and provided across-the-board title upgrades and higher salaries for all employees, *except* for the *Petitioner.*

Also the lower District Court erred when it held the Petitioner had not established a prima facie case and the lower court erred when it found Petitioner failed to establish that Respondent's reasons were pretextual. However, in a Judgment Order dated November 12, 1993, The Third Circuit Court of Appeals and a Sur Petition for Rehearing was denied on January 4, 1994.

REASONS FOR GRANTING WRIT

Certiorari should be granted since the Petition presents issues resolved by the implication of this Honorable Court, as well as any specifically intended by this Court; and that the Opinion below conflicts by implications of this Court and the decision of other Circuit Court of Appeals.

1. Generally a summary judgment may only be granted if there is no genuine issue, as to any material fact and the non-moving party receives the benefit of all reasonable doubts and inference drawn from the underlying facts, which still remain in the Petitioner's

case *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) Coastal States Gas Corp., 84 FRD (Del. D.C. 1979).*

However, in this case, summary judgment was granted, pursuant to the Fed. R. Civ. P. 56 prior to the completion of discovery and even though key issues of material fact were still in dispute.

Therefore, the summary judgment was granted, prior to the admission by the Respondents (p. 31 within their Reply Brief to the Third Circuit Court), that it was only the Petitioner's upgrade "classified" promotional title, which was treated differently from all the other younger employees, when an across-the-board title upgrades and salary increases were issued to all other employees, (the Petitioner, was *excluded).*

This statement, (together with the documents which were never disclosed), was *never* previously stated within the Respondent's papers to the lower District Court and were only stated, *after* the summary judgment was issued, but the Respondents now admit the Petitioner's classified upgrade was changed and placed in the SES/unclassified classification, in violation of the ADEA.

There is little doubt if the Petitioner was allowed to complete his discovery/depositions that additional discriminatory actions would have been discovered, to prepare his case for trial.

2. Another major proffered reason being used against the Petitioner, is the Respondent's statement, "Plaintiff failed to meet certain performance standards in his backlog."

However, after (21) years of contiguous employment, all within the same working section, the Petitioner, other than outstanding work performance ratings, *never* received an unsatisfactory work performance rating and the "backlog" was *never* used

as a criteria to evaluate the Petitioner's work performance, particularly since the Respondents knew the unit was not properly staffed for the workload.

The backlog, therefore only being a conclusionary reason, does reflect that the backlog was allowed to increase because the named Respondents, ignored the Petitioner's recommendations, since 1982, that an increase in staff was necessary to control the workload being placed upon his unit and disclosed in his affidavit.

The few discovery documents, provided by the Respondent's attorney, does reveal that between 1983 to 1986, new applications increased from (223) to (860) per year and the 386% increase was accompanied by only a 27% increase in staff.

It was for this very reason, Defendant Connolly's affidavit confirms an "explosion" occurred in the construction work being done in the State of New Jersey and therefore stated in his affidavit on *page 3;* "The reorganization was undertaken solely as a means of decreasing what had become an excessive workload for any *person, section* or *bureau.*"

Therefore, it is obvious, only when Defendant Connolly became cognizant, that it was a *HUMAN IMPOSSIBILITY* to expedite the construction plans, did he implement the very same recommendations, previously submitted by the Petitioner, to increase the staff, plus increase the salaries, in order to compete with the marketplace, and was disclosed in the documents attached to the Petitioner's affidavit.

Therefore, the backlog is solely being used by the Respondents because they planned to use the reorganization, of the former Bureau of Construction Code Enforcement, as a device to conceal their true motives and intentions, to single out and displace the Petitioner, in a manner to "make room" and provide

preferential treatment, for a younger, less experienced, *unclassified* employee, only because he retained an architect's license.

It is also evident the lower District Court erred by overlooking, *item 24* (Appendix F), of the Petitioner's affidavit, by concluding and stating; "It is uncontradicted that while plaintiff was serving as the Supervisor of the Construction Plans Approval Section plaintiff failed to meet certain performance standards in that his backlog of construction plans submitted for state approval increased to 700".

However, the Petitioner's affidavit, with attached documents all submitted to the lower District Court, clearly disputes this fact and any reasonable jury would find in favor of Petitioner, by testimony from witnesses.

3. *Here, material issues of fact exist.* The lower District Court relied upon the "standard and rigid" elements of criteria from the McDonnell Douglas and Texas Department of Community Affairs cases, to establish the elements of criteria, which were used and affirmed by the Third Circuit Court, as follows:

   (1) plaintiff is a member of the protected class

   (2) plaintiff is qualified for the position he sought but did not receive

   (3) the promotion sought was given to a person sufficiently younger to permit an inference of age discrimination.

   The lower District Court stated the Petitioner satisfied both the first and third elements of criteria, but failed the second element of criteria, stating the Petitioner was not qualified based upon the "objective" qualifications, used by the Respondents. However after summary judgment was issued the Respondents admitted the Petitioner was treated differently from the other younger employees and his

upgraded, across-the-board, promotional title, *in dispute,* was changed and placed in the SES/unclassified service rather than remaining in the classified service classification.

The dispute, is based upon the very fact now admitted to the Third Circuit Court, that if the Respondents did not treat the Petitioner *differently* from the other younger employees, but rather retained the Petitioner's upgrade in the permanent, classified Civil Service classification (as other employees), rather than changing and placing the upgrade into the SES/unclassified service classification, there *never* was *any reason* to formulate new, objective qualifications in a different employee classification used against the Petitioner, in violation of the ADEA, 29 U.S.C. §621 et seq.

The Third Circuit Court also used the standard criteria and affirmed the summary judgment.

The Third Circuit Court did not express or reach out as to the exact *minimal* requirements for the Petitioner's particular case, but were expressed by the Fifth Circuit Court of Appeals, as discovered by the Petitioner, Pro Se, and more closely compares with the issues of fact which exist in this case.

The Fifth Circuit in the *Thornbrough v. Columbus and Greenville R. Co., 760 F.2d 633 (1985)* although a reduction case, did express the minimum criteria for the Petitioner's age discrimination case, which is a non-reduction in work force case and the Petitioner need only show the *very* minimal showing that different treatment between younger and older employees occurred in the workplace to meet the doctrine established by the ADEA.

The Petitioner, a permanent classified Civil Service employee, with more than satisfactory performance review ratings, supervised the same working section for over (8) years and has worked in

the section for (21) years was displaced by an unclassified Project Specialist younger employee, employed about one (1) year.

The favored unclassified employee did not have the classified title, even equal to the Petitioner or the extensive work experience of (21) years in performing the job functions in reviewing Construction Code matters.

This is the very reason why the Petitioner, was *"already qualified"* in the permanent *classified* employee *classification* and received *higher rankings* than other engineering college graduate and/or an architect's or engineering license, by an appropriate Civil Service open competitive testing and selection process and therefore was certified and classified to *supervise* his *working section.*

The Petitioner held the titles of Project Engineer and Supervisor of Construction and Inspections which both required an engineering degree and/or an architect's or engineering license and not only performed the job functions in an outstanding manner but received promotions from such titles.

In addition, the Respondents were willing to place the Petitioner in an unclassified, upgrade promotion, also requiring the same identical qualifications as those of the new, objective qualifications, now being used as a tool to deny the Petitioner equal treatment in the workplace, in violation to the ADEA.

Therefore, it is apparent, the Petitioner maintains a valid issue of dispute, as to whether he *must requalify* to the new, objective qualifications or the second element of criteria, established by the lower District Court, solely to receive equal and compatible treatment or Equal Employment (promotional) Opportunities, in the workplace, as provided for all other employees, because the Respondents now admit the

Petitioner's upgrade (across-the-board) promotion was treated differently than the younger employees, changed in classification and placed in the SES/unclassified classification, in violation of the ADEA.

The Petitioner has shown the minimal requirements, expressed by the Fifth Circuit Court, in that; (1) he is in the protected class; (2) was already qualified to supervise his working section (in the classified classification) for the upgrade promotional position and; (3) that younger employees were more favorably treated and he was displaced by a younger, less experienced, unclassified employee, who was not equal to the Petitioner's classified permanent Civil Service classification.

In addition to the above, the "standard and rigid" elements of criteria, do not fit the "specific" criteria to the Petitioner's employment age discrimination case, since an "upgrade promotion" does not require the Petitioner to apply for the position nor the Respondents to post a job vacancy, as implied by the criteria used by the lower District Court, because the position being upgraded is already occupied.

In this context, the Fifth Circuit Court further indicated in an employment discrimination suit, the question is *not* whether Petitioner proves pretext, but rather Petitioner raises genuine issue of fact regarding pretext and material issues preclude summary judgment.

Since the Third Circuit Court remained silent and did not express the extent of evidence, either direct or circumstantial the Fifth Circuit Court also cited:

McDonnell Douglas v. Green, U.S. 792 (1973).

Texas Depart. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981).

Furnco Construction v. Waters, 438 U.S. 577 (1978).

the Honorable Supreme Court should remedy or clarify the conflicts which exist between the Third and Fifth Circuits, or any other Circuits, regarding the extent of direct or circumstantial evidence to be shown by the Petitioner for a *minimum showing*, that discriminatory actions of his employer occurred in a non-reduction case.

The Petitioner's, non-reduction in work force employment age discrimination which provided across-the-board upgrade promotions and salary increases for all other younger employees, except for the Petitioner, and therefore remains in direct violation of the ADEA.

The summary judgment against the Petitioner, which indicates the aging Petitioner was not treated differently from all the younger employees, remains incorrect and in the Petitioner's non-reduction case, in direct violation of the ADEA.

EVIDENCE OF PRETEXT

a) The proffered reason that because the Petitioner did not have an engineering degree and/or an architect's or engineering license and therefore did not meet the new, objective qualifications, formulated by the Respondents, just prior to an across-the-board upgrades were issued to all other younger, less qualified employees, except for the Petitioner, has now been admitted by the Respondents to the Third Circuit Court.

The admission clarifies why the summary judgment was submitted by the Respondents, prior to full disclosure of the discovery documents and also explains how the Petitioner's upgrade was treated differently from all the younger, less experienced employees.

Although, the upgrade of the Petitioner's work-

ing section, as a whole entity to a bureau level, was only intended to upgrade and "retitle" the out-dated previous titles and also issue salary increases for *all* of the employees, it was used as a tool to single-out, differentiate, exclude, demote and displace the Petitioner, arbitrarily, by a new, younger, less experienced unclassified employee.

Therefore, it now is conclusive, if the Petitioner's upgrade, promotional title, had remained in the classified Civil Service classification rather than being changed and placed in the SES/unclassified service classification he would have received the upgraded promotion, since the Petitioner was already qualified in the classified service. The only reason for the new, objective qualifications, specifically designed and tailored to fit only the younger, unclassified employee, was to provide preferential treatment for the younger employee and to purposely single-out, differentiate and displace the aging Petitioner and to make room for the younger unclassified employee.

b) The backlog of projects, in itself, is only a conclusionary statement and has no relevance to the Petitioner's work performance.

After (21) years of outstanding work performance and continuously receiving promotions in the classified service classification, the Petitioner never received an unsatisfactory work performance rating and the backlog was never used to evaluate the work performance of the Petitioner. The fact is as the work increased so did the Petitioner's work performance increase as well as the working section work performance increased.

Therefore, it is obvious if the lower District Court had not overlooked, item 24, (Appendix F) of the Petitioner's affidavit having attached documents and evidence, the lower Court would not have erred, by

concluding the backlog was "uncontradicted" by the Petitioner.

The fact of the matter, the Court would have discovered that the work output by the understaffed section was the highest in the history of the Division.

The section, now requires a staff of (30) employees to control a consistent monthly backlog of slightly over (300) projects, yet, under the supervision of the Petitioner, only a staff of (12) was provided.

In addition, the lower District Court would have discovered the documents in Exhibit (C), attached to the Petitioner's affidavit, recommended an increase in staffing due to the increase in workload as early as 1982, by the Petitioner and salary increases be accordingly issued to keep competitive with the marketplace. These recommendations were consistently made several times a year throughout a number of years, but were continually ignored by the named Respondents.

The Respondents, also increased the regular (35) hour work week to (40) hours and resulted in the Petitioner now receiving a lower hourly pay rate of $1.89 per hour, yet all younger less experienced employees received $3.00-$6.00 per hour pay rate increases.

Yet, the lower Courts have not found this as a reason of differential treatment between younger and older employees, even though it is in direct violation of the ADEA, the intentions of Congress or the Honorable Supreme Court.

The same (upgrade) title of Bureau Chief was always in the classified Civil Service classification prior to the non-reduction reorganization, before the working section was upgraded to a bureau level.

The articulated reasons regarding the Petitioner's work performance are conclusionary, not

based on fact, and are therefore pretextual reasons for Petitioner's demotion and replacement.

c) The basis of selection of Lange, because he was a licensed architect is also a pretext.

In order to supervise the unit effectively, an individual must have an extraordinary amount of construction codes, enforcement, inspections, and professional skills to train and guide the employees to be efficient and effective personnel.

Therefore, because an individual may retain an architect's or engineering license, does not in itself indicate that such an individual can automatically become the supervisor of the section since such a license, alone, is not even used to supervise the section, as indicated by the Petitioner's affidavit.

The state itself recognizes this and unless *any* individual obtains the necessary Construction Official licenses to appropriately enforce the construction codes and engineering standards, they *can not* implement enforcement.

Since Respondent Connolly's affidavit indicates the tentative reorganization began in 1986 and Lange became employed with DCA in November of 1985. The younger employee, Lange, was unable to be placed in the Construction Plans Approval Section, under the supervision of the Petitioner, because he *failed* to *retain* the *appropriate Construction Official* licenses. Certainly the selection of Lange, because he was a licensed architect, was used for pretextual purposes only.

Also, it should be noted, because the named Defendants, also much younger than the Petitioner, are both licensed architects, preferential treatment was given to the younger unclassified employee, only because he too is a licensed architect.

Certainly any reasonable jury would find this

reason, as conclusionary and in favor of the Petitioner, from witnesses at trial.

d) The other two (2) proffered reasons stated by the Respondents, also in conclusionary language, are combined and stated, that; "Lange was Plaintiff's supervisor prior to the reorganization and, as such, had much broader and higher level duties and responsibilities than Plaintiff; and Lange possessed stronger management skills, oral and written communication skills and was more effective in supervising professional personnel than Plaintiff."

The Respondents, (after summary judgment), now admit to the Third Circuit Court papers, that Lange was given, (a "midnight unclassified"), working title of Assistant Bureau Chief, just prior to the reorganization.

The vacancy, for the "classified" Assistant Bureau Chief was never posted by the Respondents, because Lange, even though a licensed architect neither had the proper credentials of the Construction Official licenses nor was eligible to be promoted in the permanent classified employee classification and was the very reason he was hired by DCA, as an unclassified Project Specialist in Aging.

Therefore, Lange, by *law* was never the supervisor of the Petitioner, who was mandated to continue to report directly to the Bureau Chief, prior to the reorganization.

The working title was solely used because the Respondents had already planned to provide special preferential treatment for Lange, only because he is a licensed architect and the younger, less experienced unclassified employee would be used to displace the aging Petitioner, under pretextual reasons, in direct violation of the ADEA.

Also, if the lower District Court properly re-

viewed the Petitioner's affidavit the Court would have discovered that Lange was hired in November of 1985 and Defendant Connolly's affidavit the (tentative) reorganization occurred in the later part of 1986 or less than one year of employment by Lange, who never had any training, experience, licenses or the capability to be the supervisor of the section and Defendant Connolly was well aware of the superior abilities of the Petitioner, since he states he was employed for (21) years with DCA.

The Petitioner's affidavit with attached documents discloses that under the supervision of the younger employee, Lange, the staff increased over 200%, the supervision of the professional personnel has been deficient.

Also the Respondents were well aware of the outstanding oral and written communication abilities of the Petitioner, who was guest speaker for the New Jersey Society of Professional Engineers, petitioner provided DCA sponsored, all day seminars to architects and engineers in the construction codes, served for (3) years on the Professional Engineer's construction committee, taught for Trenton State College for (3) years, wrote articles, published in professional journals and was recognized throughout the State of New Jersey (plus other states) for his knowledge and capabilities regarding construction codes and their engineering standards, Petitioner has over (30) years of direct supervisory experienced, including Chief Engineer in the private industry, supervising professional personnel.

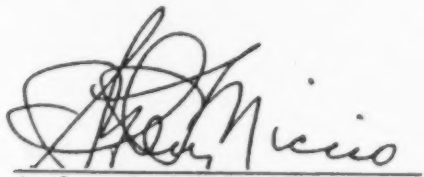
Therefore, any reasonable jury would find in favor of the Petitioner, that the statements by the Respondents were being used for pretextual reasons only.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue the judgment and opinion of the Third Circuit Court of Appeals in this matter.[2]

DATED: April 4, 1994

Respectfully submitted,



Arthur L. Miccio, Pro Se

[2]The Petitioner being Pro Se, would even prefer if the Honorable Supreme Court agrees with the issues presented in this writ, that the writ issues be remanded to the Third Circuit Court of Appeals for determination in light of this Court's opinions.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ARTHUR L. MICCIO, SR.,	:	
Plaintiff,	:	Civ. No. 91-5552 (GEB)
v.	:	
NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS, et al.,	:	**MEMORANDUM AND ORDER**
Defendants.	:	

BROWN, District Judge

This matter comes before the Court on defendants' motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6) or, in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56. Also before the Court is plaintiff's request[1] that this Court reconsider its March 22, 1993 affirmance of the magistrate judge's denial of plaintiff's motion to file a third amended complaint for failure to comply with General Rule 12(H). For the reasons set forth in this Memorandum and Order, issued pursuant to Fed. R. Civ. P. 78, the Court will: (1) deny plaintiff's request for reconsideration pursuant to General Rule 12(I): (2) deny defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6); and (3) grant defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56.

[1]As discussed *infra*, plaintiff failed to file a formal motion for reconsideration as prescribed by General Rule 12(I) of the Rules of this Court but, nevertheless, the Court will address plaintiff's request. *See infra* part II.A.

I. BACKGROUND

A. Factual Background

Plaintiff *pro se* Arthur L. Miccio, Sr. has been in the employ of defendant New Jersey Department of Community Affairs (the "NJDCA") or its predecessor for about twenty years.[2] Prior to 1986, plaintiff worked in various capacities within the bureaucratic entity including Supervisor to the then existing Construction Plans Review Section.

In 1986, in response to the explosive growth in the construction industry in the mid-1980's, and a steadily increasing backlog of construction plans submitted for state approval, the NJDCA reorganized the organizational structure of the Bureau of Construction Code Enforcement. Plaintiff's department was located within this Bureau. As part of the reorganization, the Construction Plans Review Section was reorganized and resituated within the newly created Bureau of Construction Project Review. Arthur Lange, one of three Assistant Bureau Chiefs of the Bureau of Construction Code Enforcement, was elevated to head the newly created Bureau as "Bureau Chief." Concomitantly, plaintiff was made "Supervisor" of the new Casino and Special Projects Review Section and received an annual salary increase of $2095. Displeased with Lange's promotion and the reclassification of his position, plaintiff sought administrative review through the newly-created Department of Personnel.[3] Plaintiff asserted that he was entitled to Lange's "Bureau Chief" position and that his new posi-

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[2]Plaintiff became employed with the State of New Jersey in February of 1973. Initially, plaintiff worked in the Department of Communicate Affairs—Division of Housing, which, prior to the commencement of this action, was replaced by the Division of Codes and Standards—Construction Review Section. *See* Affidavit of Arthur L. Miccio dated March 19, 1993, at §§2-4 [hereinafter Miccio Aff.].

[3]The Department of Personnel replaced the Department of Civil Service in 1986.

tion as Supervisor of the Casino and Special Projects Review Section was improperly classified.

At the behest of the Department of Personnel, a hearing was held before an independent Classification Reviewer who, on January 6, 1991, issued a Report and Recommendation rejecting plaintiff's claim that he was entitled to Lange's position. *See* Hearing Officer's Report (attached to Defs.' Br. at Exhibit B). The independent Classification Reviewer further suggested that plaintiff's position be classified as "Supervisor, Construction Plans Approval Section." *See id.* at Ra14. Moreover, in his Report and Recommendation, the independent Classification Reviewer concluded that (1) plaintiff did not possess the necessary objective qualifications for the Bureau Chief position—i.e., either an architect's or an engineering license or a college degree in one of those disciplines, and (2) Lange was eminently more qualified for the position. *See generally id.*

The matter was then reviewed by the Commissioner of Personnel who, on May 6, 1991, adopted the independent Classification Reviewer's Report and Recommendation as the final administrative decision of the Department of Personnel. *See* Final Administrative Action of the Commissioner of Personnel—Classification Appeal, issued May 6, 1991 (attached to Defs.' Br. at Exhibit C). Thereafter, on December 9, 1992, the New Jersey Superior Court—Appellate Division upheld the Commissioner's decision. *See Miccio v. NJDCA*, No. A-5577-90T1 (App. Div. 1992) (attached to Defs.' Br. at Exhibit D).

In the interim, on July 2, 1991, plaintiff, at or about the age of 60, commenced this action against the NJDCA and two if its executive officers, alleging age discrimination.

B. Procedural Background

This Court adequately set forth the procedural background of this action in its Memorandum and Order

dated March 22, 1993. Therefore, I find it unnecessary to reiterate that portion of the Court's decision here.

II. DISCUSSION

A. Plaintiff's Request for Reconsideration

In a letter dated March 30, 1993, plaintiff requested that this Court reconsider its March 22, 1993 affirmance of the magistrate judge's denial of plaintiff's motion to file a third amended complaint to add a conspiracy claim for failure to comply with General Rule 12(H). Letter from Arthur L. Miccio, plaintiff *pro se,* to Garrett E. Brown, Jr., U.S.D.J. (March 30, 1993). Despite the informal nature of plaintiff's request, the Court will, nevertheless, address the issue.

General Rule 12(I) provides:

> A motion for reargument shall be served and filed within 10 days after the filing of the Court's order or judgment on the original motion. There shall be served with the notice a memorandum setting forth concisely the matters or controlling decisions which counsel believes the Court has overlooked. No oral argument shall be heard unless the Court grants the motion and specifically directs that the matter shall be reargued orally.

General Rule 12(I). Relief under this Rule is to be granted "very sparingly." *Maldonado v. Lucca,* 636 F. Supp. 621, 630 (D.N.J. 1986). Moreover, the Court will grant a motion for reconsideration only if the movant establishes that the Court overlooked matters or decisions that, if considered, "might reasonably have altered the result reached." *Starr v. JCI Data Processing, Inc.,* 767 F. Supp. 633, 635 (D.N.J. 1991) (internal quotation omitted). The Rule's use of the term "overlooked" has two implications. First, the movant must already have presented the matter to the Court, rather than attempt to raise new matters. *SPIRG v. Monsanto Co.,* 727 F.

Supp. 876, 878 (D.N.J.), aff'd, 891 F.2d 283 (3d Cir. 1989); *Florham Park Chevron, Inc. v. Chevron U.S.A., Inc.*, 680 F. Supp. 159, 162 (D.N.J. 1988). Second, the Court must not have addressed the matter. *Carteret Sav. Bank, F.A. v. Shushan*, 721 F. Supp. 705, 706 (D.N.J. 1989); *Florham Park Chevron*, 680 F. Supp. at 163.

In the instant case, although plaintiff has already presented this matter to the Court, thereby satisfying the first prong of the two-part inquiry, plaintiff falls short of fulfilling the second in that the Court has already addressed the issues raised by plaintiff. Since plaintiff is merely raising his disagreement with the Court's initial decision, I find no merit to his Rule 12(I) request. Accordingly, plaintiff's request that this Court reconsider its March 22, 1993 affirmance of the magistrate judge's denial of plaintiff's motion to file a third amended complaint for failure to comply with General Rule 12(H) is denied.

B. Defendant's Motion to Dismiss

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) may be granted only if, accepting all well pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief. *Bartholomew v. Fischl*, 782 F.2d 1148, 1152 (3d Cir. 1986); *Angelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939, 944 (3d Cir.), *cert. denied*, 474 U.S. 935 (1985). The Court may not dismiss a complaint unless plaintiff can prove no set of facts which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Angelastro*, 764 F.2d at 944. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In setting forth a valid claim, a party is required only to plead "a short plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a).

Commensurate with the United States Supreme Court's decision in *Haines v. Kerner*, 404 U.S. 519 (1972), this Court cannot say with assurance that after reviewing the allegations contained in plaintiff's *pro se* complaint—which must be held to less stringent pleading standards than those drafted by a trained attorney—that "it appears 'beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Id.* at 520-21 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Furthermore, defendants' summary judgment motion is based upon the full factual record presented to this Court and is, therefore, the more appropriate context within which to decide whether plaintiff's claims should be dismissed. Accordingly, the Court will deny defendants' motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

C. Defendants' Motion for Summary Judgment

Summary judgment may be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In a summary judgment motion, the non-moving party receives the benefit of all reasonable doubts and any inferences drawn from the underlying facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 474 U.S. 574, 587 (1986). If the non-moving party bears the burden of proof at trial as to a dispositive issue, Rule 56(e) requires him to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324; *Schoch v. First Fidelity Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990). Issues of material fact are genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Plaintiff alleges that he was discriminated against

and effectively demoted because of his age.[4] Under the ADEA, it is unlawful for an employer to demote, discharge, or otherwise discriminate against an employee on the basis of that individual's age. 29 U.S.C. §623(1) (1988). In order to recover under the ADEA, however, the plaintiff bears the ultimate burden of proving by a preponderance of the evidence that age was "a determinative factor" in the employer's decision. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 897 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987); *Berndt v. Kaiser Aluminum & Chem Sales, Inc.*, 789 F.2d 253, 256 (3d Cir. 1986); *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984). A plaintiff need not prove that age was the employer's exclusive or sole consideration, but he must demonstrate that age made a difference in the decision. *Chipollini*, 814 F.2d at 897; *Berndt*, 789 F.2d at 256; *Duffy*, 738 F.2d at 1395.

The allocation of proof under the ADEA is well settled. *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1078 (3d Cir. 1992). Initially, the plaintiff bears the burden of establishing a *prima facie* case of unlawful discrimination. *Id.* If the plaintiff succeeds, the burden then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employer's decision. *Id.* (citations omitted). If the employer articulates such a reason, the burden shifts back to the plaintiff to de-

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[4]Plaintiff maintains that although his salary was increased from $42,189 to $44,284 after the restructuring, he was effectively demoted because his previous salary was based on a 35 hour work week while his current salary is based upon a 40 hour work week, thereby decreasing his hourly wage by $1.89. Miccio Aff. at §19. This Court finds this argument meritless in light of plaintiff's assertions that for three years prior to the reorganization, plaintiff was forced to work nights, weekends, and through lunch without compensation due to staffing problems. *See id.* at §12. Therefore, the Court will address plaintiff's ADEA claim solely in the context of plaintiff's allegation that the defendants' decision to elevate Lange instead of plaintiff to the position of Bureau Chief was due in part to plaintiff's advancing age.

monstrate that the employer's proffered reason is pretextual or that its decision was more likely based on some discriminatory reason. *Id.* (citations omitted).

1. Plaintiff's *Prima Facie* Case

Defendants first argue that plaintiff has failed to sustain his burden of establishing a *prima facie* case of age discrimination. As the Third Circuit has repeatedly held, in the absence of direct evidence, a plaintiff may establish a *prima facie* case of age discrimination by demonstrating by a preponderance of the evidence that (1) plaintiff is a member of the protected class; (2) plaintiff was qualified for the position that he sought but did not receive; and (3) the promotion plaintiff sought was given to a person sufficiently younger to permit an inference of age discrimination. *See id.; Turner v. Schering-Plough Corp.*, 901 F.2d 335, 342 (3d Cir. 1990); *Siegel v. Alpha Wire Corp.*, 894 F.2d 50, 53 (3d Cir.), *cert. denied*, 496 U.S. 906 (1990); *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1212 (3d Cir. 1988), *cert. denied*, 490 U.S. 1098 (1989); *Chipollini*, 814 F.2d at 897; *Dreyer v. Arco Chem. Co.*, 801 F.2d 651, 654 (3d Cir. 1986), *cert. denied*, 480 U.S. 906 (1987).

With respect to plaintiff's status, he clearly belongs to the class of individuals protected under the ADEA in that the ADEA protects individuals between the ages of 40 and less than 70. *See* 29 U.S.C. §631(a) (1988). Plaintiff was approximately 56 years of age when he was passed up for the position of Bureau Chief in 1986. Additionally, plaintiff also easily satisfies the third requirement in that Arthur Lange, the individual who received the promotion plaintiff sought, is about 11 years younger than plaintiff.

Regarding the second element, however, defendants argue that plaintiff has failed to demonstrate that either his credentials or his level of performance qualified him for the position of Bureau Chief. In an attempt to prove that he was in fact qualified for the promotion, plaintiff

avers that he: (1) possessed a high level of knowledge and experience in the field; (2) was highly regarded among his peers; and (3) outscored several licensed engineers and architects on the Civil Service examination. *See* Miccio Aff. at §§6-8, 15, 20-22. However, plaintiff's subjective belief that he was more than qualified for the job is not sufficient to preclude the grant of summary judgment. *Allen v. Denver Public School Bd.*, 928 F.2d 978, 985 (10th Cir. 1991). Furthermore, plaintiff admits that he neither possesses an architect's or an engineering license, nor has he earned a college degree in one of those disciplines—a prerequisite for the position of Bureau Chief. *See id.* at §6; Affidavit of William M. Connolly dated February 18, 1993, at §9 [hereinafter Connolly Aff.]. On the other hand, Lange is a licensed architect. *See id.* It is also uncontradicted that while plaintiff was serving as the Supervisor of the Construction Plans Review Section, plaintiff failed to meet certain performance standards in that his backlog of construction plans submitted for state approval increased to 700. *See id.* at §6.

Therefore, plaintiff has failed to establish an essential element of his *prima facie* case of unlawful discrimination; namely, that he was qualified for the position that he sought but did not receive. Furthermore, as will be dicussed *infra,* plaintiff has also failed to sustain his burden of establishing that the defendants' proffered legitimate reasons for promoting someone other than plaintiff are pretext for discrimination. *See infra* part II.C.3. Accordingly, this Court will grant defendant's motion for summary judgment.

2. Defendants' Nondiscriminatory Reasons

Assuming, *arguendo,* that plaintiff had established a *prima facie* case, the burden would then shift to the defendants to articulate a legitimate, nondiscriminatory reason for their decision to promote someone other than plaintiff. *Gray,* 957 F.2d at 1078; *see also Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254-55

(1981). A defendant need not *prove* a legitimate, nondiscriminatory reason, but merely articulate one. *Id.* The undisputed facts of the record show that the defendants have met this burden. Defendants maintain that the following factors were the basis for promoting Lange instead of plaintiff to the position of Bureau Chief: (1) plaintiff does not possess the necessary objective qualifications for the Bureau Chief position—i.e., either an architect's or an engineering license or a college degree in one of those disciplines; (2) Lange is a licensed architect; (3) plaintiff failed to meet certain performance standards in the reduction of his backlog; (4) Lange was plaintiff's supervisor prior to the bureaucratic reorganization and, as such, had much broader and higher level duties and responsibilities than plaintiff; and (5) Lange possessed stronger management skills, oral and written communication skills, and was more effective in supervising professional personnel than plaintiff. *See* Connolly Aff. at §§6-14. Thus, the defendants have articulated a legitimate, nondiscriminatory reason for promoting someone other than plaintiff and have thus met their burden.

3. Plaintiff's Evidence of Pretext

Having articulated a legitimate, nondiscriminatory reason for elevating someone other than plaintiff to the position of Bureau Chief, the burden shifts back to the plaintiff to demonstrate that the defendants' proffered reasons are pretextual or that their decision was more likely based on some discriminatory reason. *Gray,* 957 F.2d at 1078 (citations omitted). Plaintiff's burden at trial would be to prove by a preponderance of the evidence that the proffered reasons are simply pretext. *Bruno v. W.B. Saunders Co.,* 882 F.2d 760, 764 (3d Cir. 1989), *cert. denied,* 493 U.S. 1062 (1990); *Sorba v. Pennsylvania Drilling Co.,* 821 F.2d 200, 202 (3d Cir. 1987), *cert. denied,* 484 U.S. 1019 (1988). For purposes of denying summary judgment, however, plaintiff need not actually carry this burden. *Siegel,* 894 F.2d at 53.

Instead, the evidence must, at a minimum, create a genuine issue of material fact as to defendants' proffered reasons. *Id.* Moreover, only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" may the court enter summary judgment. *Chipollini,* 814 F.2d at 896. In other words, in order to defeat a summary judgment motion based only on a defendant's proffer of a nondiscriminatory reason, "a plaintiff who has made a *prima facie* showing of discrimination, need only point to evidence establishing a reasonable inference that the employer's proffered explanation is unworthy of credence." *Sorba,* 821 F.2d at 205. This, plaintiff has failed to do.

Plaintiff asserts that he genuinely feels that he was more qualified than Lange for the position and that the defendants conspired[5] to discriminate against him because (1) he is not a licensed architect, and (2) he was older than Lange. *See* Miccio Aff. at §§14-22. These claims, however, do little to further plaintiff's cause. Moreover, merely reciting that age was the reason for the decision does not make it so. *Billet v. Cigna Corp.,* 940 F.2d 812 (3d Cir. 1991) (citing *Meiri v. Dacon,* 759 F.2d 989, 998 (2d Cir.), *cert. denied,* 474 U.S. 829 (1985) (conclusory allegations of discrimination are insufficient to satisfy the requirements of Fed. R. Civ. P. 56(e))). As the Third Circuit has held:

> [P]laintiff cannot rely soley on a potential finding that the defendant's explanation is im-

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[5]It is worth noting that plaintiff, despite devoting an inordinate amount of time in his opposition brief accusing the defendants of conspiring to discriminate against him on the basis of his age, did not properly amend his complaint to add a conspiracy claim. *See* Order dated January 4, 1993 (filed by Magistrate Judge John J. Hughes); see also Memorandum and Order dated March 22, 1993; *supra* part II.A. Accordingly, the Court will not address plaintiff's allegations of conspiracy.

> plausible. The fact that a judge or jury might disbelieve the defendant's asserted non-discriminatory reason is not enough, by itself, to preclude summary judgment. Rather the plaintiff must be able to adduce evidence, whether direct or circumstantial, from which a reasonable juror could conclude that the defendant's explanation is incredible.

Chauhan v. M. Alfieri Co., 897 F.2d 123, 128 (3d Cir. 1990). Plaintiff has failed to meet his burden with respect to this issue. Accordingly, this Court will grant defendants' motion for summary judgment.

III. CONCLUSION

For the foregoing reasons,

It is this 24th day of April 1993,

ORDERED that defendants' motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6) be and is hereby DENIED; and it is

FURTHER ORDERED that defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56 be and is hereby GRANTED.

Garrett E. Brown, Jr.

GARRETT E. BROWN, JR., U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5302

ARTHUR L. MICCIO, SR.

Appellant

vs.

NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS; WILLIAM CONNOLLY; CHARLES DECKER

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 91-05552)
District Judge: Honorable Garrett E. Brown, Jr.

Submitted Under Third Circuit LAR 34.1(a)
November 3, 1993
Before: MANSMANN, GREENBERG and NYGAARD,
Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against the appellant.

BY THE COURT,

Carol Los Mansmann

Circuit Judge

Attest:

P. Douglas Sisk

P. Douglas Sisk, Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5302

ARTHUR L. MICCIO, SR.

Appellant

vs.

NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS; WILLIAM CONNOLLY; CHARLES DECKER

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge,
BECKER, STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD,
ALITO, ROTH and LEWIS, Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

Carol Los Mansmann

Circuit Judge

DATED: January 4, 1994

98 Hinckle Avenue
West Trenton, NJ 08628

New Jersey Division of Law
Justice Hughes Complex
CN 112
Trenton, New Jersey 08624

Attention: Ms. June K. Forrest
Sr. Deputy Attorney General

Re: Miccio vs. DCA, et al.
Docket No.
3-91-CV-05552

Dear Ms. Forrest:

This another request for discovery information and also a reply to your "answer to interrogatories and amended pleadings."

Also, because I only requested "public" information that you claim is unable to be disclosed due to it being privileged or other similar reasons, please provide the following:

1. A specific reason for withholding such documents
2. A statement of the basis for your claim that such public information cannot be disclosed
3. Brief description of the documents:
   (a) dates of documents, number of pages, attachments, etc.
   (b) authors and identification by the employee titles of each person
   (c) custodian of the documents
   (d) subject matter, including those relating to meetings, identification of such meetings,

conversations relating to such information requested, etc.

The following discovery requests remain in the same sequence as previously requested and responded by you.

Item No. 1: (Plaintiff's personnel file)

I request that I be allowed to personally review my personnel records retained by DCA.

Item No. 2: (Mr. Decker, named Defendant)

Please note, I am not requesting any personal information, i.e., weight, height, health, religion, etc., which remains irrelevant to the facts for discovery (also for any other individual employee).

However, please disclose the following information:

(B) Provide the score and ranking obtained by Mr. Decker, from the Civil Service open competitive examination for the title of Supervisor, Construction Inspection Section (Symbol: 127B, Code: HSRXR-7)

Also provide all information and reasons as to why this title was not issued through the promotional process.

(C) Provide the same general information as requested in "B" above, regarding the promotional examination which permitted Mr. Decker to be promoted to a Bureau Chief position by DCA.

Item No. 3: (Mr. Connolly, named Defendant)

Please amend Item No. 3 to include the following:

1. Any and all information regarding the upgrade

and elevation of the Construction Plans Approval Section to a bureau level within the possession and knowledge of the named Defendant.

Include all notes, memos, all reports including those relating to the new bureau, etc.

2. Disclose the procedure used to determine the selection of the Bureau Chief position.

Should you declare the production of such documents are unable to be disclosed, please respond in detail as previously requested in the second paragraph of this letter.

Also, if any documents have been lost or destroyed, provide the following information:

(a) Approximate date they were lost or destroyed

(b) Circumstances and manner such information was lost or destroyed

(c) Reasons for the documents to be lost or destroyed

(d) Identify the emloyees having any knowledge of the circumstances and/or reasons

(e) Identify the employees who lost or destroyed the documents

(f) Identify the persons having knowledge of the contents of the documents

Item No. 5:

1. Please disclose all information as to how Mr. Melillo held the title of Supervisor, Construction Inspection Section in 1979, since the Civil Service examination was not offered until on or about 1981.

2. Also, disclose all informtion as to how Mr. Melillo obtained the title of Supervisor, Construction Inspection Section in 1983.

   Note: If it was through a bona fide Civil Service list, provide his test score and ranking issued to him by Civil Service and as previously requested for Mr. Decker in 2B.

Reorganization Information

Provide the following information, regarding the employees listed below; date hired, title, salary, date they obtained their subcode and/or construction official license and job location:

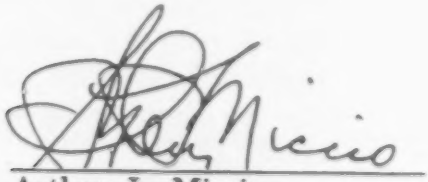
Georgia Brown, Rudy Ince, Al Travis, Fayes Alfaink, Salvatore Cavaluzzo and Ally Kiozpeoplou

General Information

Item No. 1: Provide the date DCA formulated the Affirmative Action Group

Also provide all information if DCA has any other Discrimination Complaints pending.

Very truly yours,



Arthur L. Miccio
January 6, 1993

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
ROBERT J. DEL TUFO
ATTORNEY GENERAL
DIVISION OF LAW
JACK M. SABATINO
DIRECTOR
RICHARD J. HUGHES JUSTICE COMPLEX
CN 112
TRENTON, NJ 08625
(609) 292-8572

March 5, 1993

Arthur L. Miccio, Sr.
98 Hinckle Avenue
West Trenton, NJ 08628

Re: Miccio v. DCA

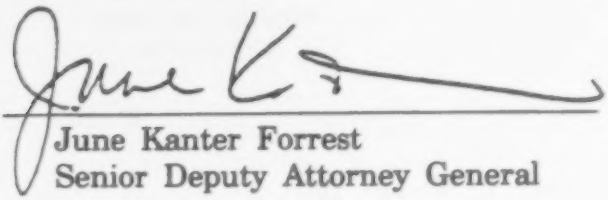
Dear Mr. Miccio:

I am in receipt of your additional request for answers to interrogatories and for documents. The State, in response to your previous request provided you with a voluminous amount of documents and with answers to your many questions. Your current questions ask us in many instances to answer your previous interrogatories again and to explain why we could not provide certain answers. In view of the large amount of discovery which was previously supplied to you and in view of the repetitive and duplicitous nature of your current request, as well as the expense to the taxpayers of New Jersey in complying with burdensome discovery demands made on the State and because this case is now the subject of a motion for summary judgment and/or dismissal for

failure to state a claim, I must ask that all discovery requests be held in abeyance pending disposition of the motion. Thank you for your cooperation.

Very truly yours,

ROBERT J. DEL TUFO
ATTORNEY GENERAL OF NEW JERSEY

By: 
June Kanter Forrest
Senior Deputy Attorney General

JKF:smb
c: Pamela E. Katten, DAG
Magistrate John J. Hughes

However, because of a Conspiracy by Messrs. Connolly and Decker and because the upgrade title was elevated to a Bureau Chief title the named Defendants claim all previous qualifications obtained by me, are now **null and void** and I am no longer qualified to continue as the supervisor of the unit.

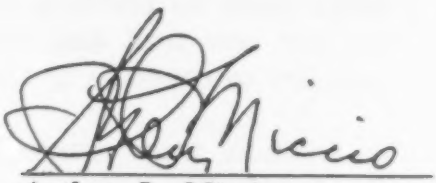
In addition, they placed the upgrade title into an "unclassified" position because the new, much younger employee is also an unclassified employee and remains uncertified by Civil Service.

22. Therefore, even though **I remain qualified because of previous qualifications obtained through DOP (Civil Service),** I remain removed, displaced by a far less qualified, younger employee to now supervise the same employees, performing the same job functions, who I previously supervised for over (8) years, in direct violation of the ADEA Act and §1983.

23. Discovery Evidence to present full disclosure has been withheld from me and a Desparate and Conspiracy Claim was filed to this Court and is also submitted as part of this affidavit and response brief.

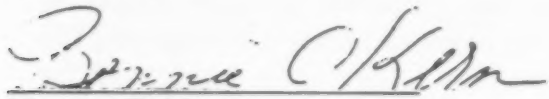
24. For any other reasons, the issues within the response brief should also be considered a part of this affidavit.

The foregoing statements made by me are true. I understand that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.



Arthur L. Miccio
Date: March 19, 1993

Sworn to and Subscribed
before me this 19th day of
March, 1993.



Notary Public

BONNIE C. KERN
Notary Public State of New Jersey
My Commission Expires December 1996